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RECORD
AND
BRIEFS

IN THE

Supreme Court of the United States

ESTHER KIOBEL, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR *AMICI CURIAE* ABUKAR HASSAN AHMED, DANIEL ALVARADO, DR. JUAN ROMAGOZA ARCE, ALDO CABELLO, ZITA CABELLO, AZIZ MOHAMED DERIA, DOLLY FILARTIGA, NERIS GONZALES, GLORIA REYES, OSCAR REYES, CECILIA SANTOS MORAN, ZENAIDA VELASQUEZ, BASHE ABDI YOUSUF, AND THE CENTER FOR JUSTICE AND ACCOUNTABILITY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici Abukar Hassan Ahmed, Daniel Alvarado, Dr. Juan Romagoza Arce, Aldo Cabello, Zita Cabello, Aziz Mohamed Deria, Dolly Filartiga, Neris Gonzales, Gloria Reyes, Oscar Reyes, Cecilia Santos Moran, Zenaida Velasquez, and Bashe Abdi Yousuf are survivors of gross human rights violations who have filed suit against the individuals responsible for perpetrating those abuses under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS). *Amicus* Center for Justice and Accountability (CJA) is a non-profit organization dedicated to advancing the rights of survivors to seek truth, justice, and redress. Since its founding in 1998, CJA has successfully represented survivors of human rights abuses in sixteen ATS suits against individuals who have come to the United States after directly committing or presiding over the types of heinous human rights abuses, crimes against humanity, torture, and war crimes, that undeniably amount to violations of the law of nations.

This case will determine whether and when the ATS applies to extraterritorial conduct. *Amici* have a strong interest in the proper resolution of these questions because, while lawsuits under the ATS are

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondent have filed a letter of consent with the Clerk of the Court.

typically brought by and against United States residents, the abuses at issue always occur in foreign territory. Thus, a categorical preclusion of ATS suits based on extraterritorial events would mean that survivors like *amici curiae* are deprived of a remedy in U.S. courts, and would upend the longstanding policy of the United States to prevent this country from becoming a safe haven for perpetrators of egregious human rights abuses.

SUMMARY OF ARGUMENT

Although this case involves claims against a foreign corporation, in many Alien Tort Statute suits, the defendant is an individual U.S. resident subject to the general jurisdiction of American courts. *Amicus* CJA focuses on bringing claims of this kind, filing lawsuits in federal courts against perpetrators of egregious human rights crimes who take up residency in the United States.

It has long been established that a nation's courts may exercise general jurisdiction over the country's residents, even for acts committed elsewhere. It is therefore entirely appropriate that individuals who come to the United States would be subject to suits in this country for claims that arise abroad – whether the claims arise from automobile accidents in Europe, theft of trade secrets in Asia, or intentional torts in Africa. Adjudicating lawsuits here for extraterritorial acts violating the law of nations involves no unusual, much less unprecedented, exercise of jurisdiction. Indeed, it would be perverse to carve out an exception to the fundamental tenet of general jurisdiction for abuses as severe as torture and genocide. In keeping with

this principle, for over three decades, and in each case brought by *amici*, federal courts have affirmed their power to exercise jurisdiction over individuals who come to the United States after committing egregious human rights abuses abroad.

At the same time, exercising jurisdiction over ATS suits against U.S. residents responsible for atrocities perpetrated abroad is essential to fulfilling the country's longstanding commitment to denying safe haven to human rights abusers who take refuge in our country and enjoy the benefits and privileges of living in the United States. ATS litigation advances this objective because civil liability is, in and of itself, a denial of safe haven. Further, holding perpetrators of human rights abuses civilly liable for these abuses can support immigration enforcement measures, including, when appropriate, deportation or removal of individuals responsible for human rights atrocities. If the U.S. residents sued in ATS suits were not held liable in U.S. courts, many would escape responsibility for their wrongs because as a practical matter this country often is the only place they can be held accountable.

Categorically excluding ATS jurisdiction over cases arising from conduct abroad therefore would undermine important U.S. interests, and for no good reason. Other existing legal doctrines are available to limit the prospect of litigation having no real nexus with the United States. Properly applied, the doctrines of personal jurisdiction and *forum non conveniens* will keep ATS litigation within reasonable limits, as will the Government's continued success in intervening to encourage the dismissal of suits with an undue risk of diplomatic tension. By

contrast, a categorical bar would likely only push human rights litigation into state courts, impeding the Government's ability to monitor and intervene in human rights suits, creating a patchwork of inconsistent laws in a field in which uniformity is of paramount importance, and thwarting what is irrefutably a principal objective of the ATS – to ensure that cases involving violations of the law of nations be heard in federal courts.

ARGUMENT

In briefing this case last Term, respondents and their *amici* questioned the propriety of a U.S. court hearing claims brought by alien plaintiffs against a foreign-based corporation for events that occurred in a foreign country. Following oral argument, this Court ordered the parties to brief and argue the question whether and when the ATS "allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

Amici urge this Court to recognize that although this case involves an ATS claim against a foreign corporation, many ATS suits are brought against natural persons who, after having committed egregious human rights violations in their home countries, make their way to the United States, and sometimes take up residency here, fully availing themselves of the privileges and protections of our laws. The United States thus often has a strong connection to ATS suits, which advance important U.S. interests, including denying safe haven to human rights abusers and providing survivors a forum to seek redress for prescribed categories of

universally condemned practices. Accordingly, as petitioner explains, and as argued here, the ATS is properly construed to apply extraterritorially.

By contrast, a categorical prohibition against hearing any ATS claim involving conduct that took place within another nation's territory would undercut important federal interests both in denying safe haven to human rights abusers and in ensuring uniformity in the litigation of human rights claims in U.S. courts. And such a categorical rule is unnecessary in light of various other mechanisms for ensuring that U.S. courts do not assume jurisdiction inappropriately.

I. ATS Litigants Often Have A Substantial Nexus To The United States.

In many cases, ATS defendants are individuals residing in the United States at the time they are sued. Across a wide range of legal claims, it is unexceptional for U.S. courts to hear suits against U.S. residents, over whom they have general jurisdiction, even when the underlying events occurred overseas.

A. U.S. Courts Routinely Resolve Disputes Against U.S. Residents That Are Rooted In Extraterritorial Events.

It is well established that individuals are subject to general jurisdiction in the state in which they live. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile."). "The state which accords [a domiciliary] privileges

and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties," including the obligation to submit to the state's general jurisdiction. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). And when a court has general jurisdiction over a defendant, it may "resolve both matters that originate within the State and those based on activities and events elsewhere." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011).

U.S. courts frequently adjudicate suits involving events or transactions abroad when the defendant is otherwise subject to general jurisdiction. *See, e.g.*, *K.T. v. Dash*, 827 N.Y.S.2d 112 (App. Div. 2006) (suit against New York defendant regarding rape that occurred in Brazil); *Fay v. Thiel Coll.*, 55 Pa. D. & C.4th 353 (Ct. Com. Pl. 2001) (suit against Pennsylvania college regarding sexual assault that occurred on study abroad trip in Peru); *Thomas v. Hammer*, 489 N.Y.S.2d 802 (App. Div. 1985) (suit against New York defendant regarding car accident that occurred in Canada).

In light of this well developed law of general jurisdiction, it would be perverse to permit a plaintiff alleging a single act of violence abroad to proceed against a U.S. resident in U.S. courts while denying plaintiffs harmed by a systematic campaign of terror and violence from bringing their cases here. Just as a U.S. court had jurisdiction over a rape victim's suit against her attacker for an assault that occurred in Brazil, *see* 827 N.Y.S.2d at 115, so too a U.S. court had jurisdiction when a woman encountered her assailant in the Atlanta hotel where they both worked and subsequently brought suit against him

under the ATS for his responsibility in having her stripped, bound, hung from a pole, and beaten during a prolonged detention in Ethiopia. *See Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

Requiring individuals to answer suit in their home jurisdiction for their behavior outside the country is, of course, perfectly fair because such individuals enjoy the "benefits and protections" of the laws of their home state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Perpetrators of human rights crimes taking refuge in the United States live here and fully enjoy the benefits of residency in a stable country with a vibrant economy and fair judicial system.

B. Many ATS Suits Involve U.S. Residents As Plaintiffs And Defendants.

While this case involves a foreign corporate defendant alleged to have aided or abetted human rights abuses abroad, the decision here will also govern the ability of victims of human rights abuses to seek justice against defendants who are natural persons taking refuge in the United States. Such cases are common. Of the sixteen ATS cases CJA clients have filed, fourteen involved at least one U.S. resident defendant and nine involved at least one U.S. resident plaintiff. These cases illustrate the deep ties ATS litigants commonly have to this country.[2]

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[2] The case summaries that follow draw on *amicus* CJA's records; overviews of all the cases are available at www.cja.org.

1. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). Since 1997, former Somali General Mohamed Ali Samantar has lived continuously in Fairfax, Virginia. During that time, he has availed himself of the benefits of living in this nation, including receiving medical care of a quality that he would not be able to enjoy in his native country, Somalia. Samantar was sued under the ATS for his role as Commander of the Somali Armed Forces in the 1980s, when he ordered and presided over a campaign of terror in Northwestern Somalia, including the widespread torture, arbitrary detention, and massacre of thousands of innocent Somalis, many of whom were targeted simply because they were members of the Isaaq clan. Among the plaintiffs in the ATS suit were two U.S. residents. On the day his trial was set to begin, Samantar admitted that he was responsible for the plaintiffs' injuries and accepted full liability for these acts of torture, extrajudicial killing, war crimes, and crimes against humanity.

2. *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005). Former death squad leader Colonel Armando Fernández-Larios moved to the Miami area in about 1990 and became an auto body shop manager. He had various business ventures over the years, including the incorporation of an unsuccessful import company and an investment in a commercial art gallery. While living in Florida, Fernández-Larios was sued under the ATS for his role in the infamous "Caravan of Death" during the Augusto Pinochet dictatorship. During that period, Fernández-Larios crisscrossed northern Chile carrying out extrajudicial killings, torture, and other abuses against innocent Chileans, including Winston

Cabello, for their alleged opposition to the military *junta*. Winston Cabello's brother and sister, both *amici*, fled Chile for the United States in the 1970s, and have settled here. In the ATS lawsuit against Fernández-Larios, a Florida jury held him liable for crimes against humanity, torture, and extrajudicial killing and ordered him to pay $6 million in damages.

3. *Doe v. Constant*, 354 F. App'x 543 (2d Cir. 2009). Former death squad leader Emmanuel "Toto" Constant moved to New York from Haiti in 1994. He was sued under the ATS for attacks committed by the Revolutionary Front for the Advancement and Progress of Haiti (FRAPH), a death squad he founded during Haiti's military regime in the early 1990s. Members of FRAPH invaded homes during midnight raids searching for evidence of pro-democracy activity, during which they would often gang rape women in front of their family members. The three plaintiffs in the case, all survivors of rape, were also U.S. residents. Constant was found liable for torture, rape and crimes against humanity and ordered to pay $19 million in damages.

After moving to the United States, Constant changed his profession from death squad leader to mortgage scam artist. While the ATS suit was pending, Constant was indicted by New York for his role in a scheme that cheated lenders out of $1.7 million. Although he originally negotiated a plea limiting his sentence to time already served, the judge rejected it after CJA and its plaintiffs informed him of Constant's human rights abuses. In doing so, the judge concluded that the alleged murder and torture allegations facing Constant in his homeland "are heinous, and the court cannot in good conscience

consent to the previously negotiated sentence." Order Denying Negotiated Sentence at 2, *People v. Constant*, No. 8206/2007 (N.Y. Sup. Ct. May 22, 2007). Constant is currently in prison serving a twelve to thirty-seven year sentence.

4. *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009). Former Salvadoran Colonel Nicolas Carranza moved to Memphis, Tennessee in 1986 and became a real estate agent and then a security director for an art museum. He was sued under the ATS for his role in human rights abuses committed by troops under his command while he was Vice Minister of Defense for El Salvador. A Memphis jury found Carranza liable and awarded $6 million in damages. The verdict was upheld by the Sixth Circuit. Three of the plaintiffs were U.S. residents. Following the verdict, the plaintiffs secured liens against two of Carranza's U.S. bank accounts. Liens have also been secured against two of Carranza's Memphis homes.

5. *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006). Former Salvadoran Generals Carlos Vides Casanova and José Guillermo Garcia moved to Florida from El Salvador in 1989. They were both sued under the ATS by U.S. residents, two of whom later became U.S. citizens. A jury in West Palm Beach, Florida found Generals Vides Casanova and Garcia liable for their role in supervising mass abduction and torture as leaders of El Salvador's military in the early 1980s, and ordered them to pay $56 million. This verdict was ultimately upheld by the 11th Circuit. To date, Casanova has been forced to relinquish more than $300,000 of his assets from a U.S. bank account to satisfy the judgment.

6. *Reyes v. López Grijalba*, No. 02-22046-Civ-Lenard/Klein (S.D. Fla). Former Honduran Chief of Intelligence Juan Evangelista López Grijalba moved to the United States in 1998, when he was granted Temporary Protected Status as a result of Hurricane Mitch. While living here, he was sued under the ATS for his role in overseeing the torture, disappearance, and extrajudicial killing of hundreds of citizens suspected of ties to the political opposition in Honduras. López Grijalba was found liable by a federal court in Florida for human rights abuses and ordered to pay $47 million to six plaintiffs, including three of the *amici* here, all of whom are U.S. residents.

7. *Jean v. Dorélien*, 431 F.3d 776 (11th Cir. 2005). Former Haitian Colonel Carl Dorélien moved to the United States from Haiti in 1995 and settled in Florida, where he won over $3 million in the state lottery in 1997. He was sued under the ATS for arbitrary detention, torture, and extrajudicial killing. A Florida jury found Dorélien liable for his role as member of the Haitian military's high command in perpetrating widespread atrocities, and it awarded $4.3 million in damages. CJA successfully recovered $580,000 in remaining lottery funds for its clients, one of whom was, and remains, a U.S. resident.

8. *Ahmed v. Magan,* Civil Action 2:10-cv-342 (S.D. Ohio). Former Colonel Abdi Aden Magan, who was in charge of the Somali National Security Service Department of Investigations, moved to the United States from Somalia in 2000. While living in Ohio, he filed and eventually settled a personal injury claim against the U.S. Department of Housing and Urban Development and a property management

company of an apartment complex he visited. Magan was sued in Ohio federal court under the ATS for ordering the torture of a former constitutional law professor who was arbitrarily detained in Somalia.

As these cases demonstrate, defendants in ATS suits often have deep and significant ties to the United States. Having established these ties, there is no legitimate basis to carve out an exception from the fundamental tenet of general jurisdiction to shield these perpetrators of law of nations violations from accountability in U.S. courts.

II. ATS Litigation Against Individuals Who Have Committed Human Rights Abuses Abroad Furthers Significant U.S. Interests.

A. The United States Has An Interest In Denying Human Rights Abusers Safe Haven.

It has long been the policy of the United States to deny safe haven to individuals who come here after committing human rights abuses abroad. This policy is consistent with well recognized principles of international law that provide for accountability for individual perpetrators of human rights abuses.[3] The

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[3] *See Kiobel v. Royal Dutch Petroleum*, 621 F. 3d 111, 118-119 (2d Cir. 2010) ("The singular achievement of international law since the Second World War has come in the area of human rights, where the subjects of customary international law, - *i.e.*, those with international rights, duties, and liabilities – now include not merely states, but also *individuals*. . . In short, because customary international law imposes individual liability for a limited number of international crimes – including war crimes, crimes against humanity (such as genocide), and torture – we have held that the ATS provides jurisdiction over

United States has demonstrated its commitment to this policy by prosecuting human rights abusers, deporting them, and of particular significance here, taking affirmative steps to ensure that U.S. courts are forums for holding them civilly liable.

The Torture Victim Protection Act, 28 U.S.C. § 1350 note, discussed in greater detail *infra* at 22-23, is a notable example of the Government's commitment to denying safe haven. But there are many others. The Genocide Accountability Act amended the U.S. Code to allow for the prosecution of genocides committed abroad. *See* Genocide Accountability Act, Pub. L. No. 110-151, § 2, 121 Stat. 1821 (2007) (codified at 18 U.S.C. § 1091). The Child Soldiers Accountability Act allows for the deportation of individuals who have recruited or used child soldiers. *See* Child Soldiers Accountability Act, Pub. L. No. 110-340, § 2(c), 122 Stat. 3735 (2008) (codified at 8 U.S.C. § 1227(a)(4)(F)). The Human Rights Enforcement Act (2009) established a section within the Criminal Division of the Department of Justice with a specific mandate to enforce human rights laws. *See* Human Rights Enforcement Act, Pub. L. No. 111-122, § 2(b), 123 Stat. 3480 (2009) (codified at 28 U.S.C. § 509B).

Congress has also ratified several treaties that commit the United States to either extradite or prosecute human rights abusers, including the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions, and the

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claims in tort against individuals who are alleged to have committed such crimes.").

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See* U.S. Dep't of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2011, at 379-80, 448-49, 472 (2011).

These statutes and treaties reflect the political branches' consistent stance that the United States must not become a safe haven for perpetrators of human rights crimes. The Executive Branch has declared its commitment to "ensuring that no human rights violator or war criminal ever again finds safe haven in the United States" and to "marshal[ing] our resources to guarantee that no stone is left unturned in pursuing that goal."[4] Just since 2007, the Legislative Branch has held three hearings entitled "No Safe Haven" to address how Congress can ensure that the United States is not a sanctuary for human rights abusers.[5]

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[4] *No Safe Haven: Accountability for Human Rights Violators, Part II: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 10 (2009) (statement of Lanny A. Breuer, Assistant Att'y Gen., Criminal Division), *available at* http://www.justice.gov/criminal/icitap/pr/2009/10-06-09breuer-testimony.pdf.

[5] *See No Safe Haven: Accountability for Human Rights Violators in the United States*, Hearing before the Subcommittee on Human Rights and the Law of the Senate Judiciary Committee (Nov. 14, 2007), *available at* http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da130e97b; *No Safe Haven: Accountability for Human Rights Violators, Part II*, Hearing before the Subcommittee on Human Rights and the Law of the Senate Judiciary Committee (Sept. 25, 2009), *available at*

B. Applying The ATS Extraterritorially Furthers The U.S. Interest Of Denying Safe Haven.

The United States' policy of denying safe haven to human rights abusers is furthered by keeping federal courts open to suits against them. When these perpetrators are in the United States, it will often be impossible to hold them accountable anywhere else. Moreover, neither other federal statutes nor state tort law can adequately vindicate all of the harms suffered by survivors and victims. The ATS thus serves a vital role in holding human rights abusers accountable and in providing redress to victims. This interest is reflected in the occasions on which the Government has filed Statements of Interest informing federal courts that it supports ATS plaintiffs' right to bring suit. *See infra* at 29-32.

1. ATS Suits Deny Human Rights Abusers Safe Haven.

ATS suits against human rights abusers in the United States advance the goal of preventing the United States from serving as a sanctuary for human rights abusers in two ways. First, providing for civil liability itself denies human rights violators safe haven. In the course of enacting the TVPA, Congress

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http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da150e38c; *No Safe Haven: Law Enforcement Operations Against Human Rights Violators in The U.S.*, House Committee on Foreign Affairs, Tom Lantos Human Rights Commission (Oct. 13, 2011), *available at* http://tlhrc.house.gov/hearing_notice.asp?id=1217.

endorsed ATS actions as an important tool to bring perpetrators of human rights violations to justice. *See* S. Rep. No. 102-249, at 4 (1991) ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act) . . . . *Section 1350 has other important uses and should not be replaced*") (emphasis added); H. R. Rep. No. 102-367, at 3 (1991) (same). Congress intended that the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." *Id.* at 4; S. Rep. No. 102-249, at 5 (same); *see also* Pet'r's Supplemental Opening Br. 14-15 & n.5. Indeed, in discussing the interplay between the TVPA and the ATS, this Court recognized that Congress "not only expressed no disagreement with our view of the proper exercise of the judicial power [under the ATS], but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004).

Second, ATS litigation can deny safe haven by contributing to immigration enforcement actions against perpetrators of egregious human rights abuses. For instance, two *amici* testified in the immigration removal proceedings brought by the Department of Homeland Security against former Salvadoran General Vides Casanova, which recently resulted in a finding of removability. *See* Julia Preston, *Salvadoran May Face Deportation for Murders*, N.Y. Times, Feb. 24, 2012, at A17. Likewise, after an ATS suit was successfully

completed against López Grijalba, the erstwhile Honduran Military Intelligence leader, he was deported.

2. Human Rights Abusers In The U.S. Often Cannot Practicably Be Sued In The Country Where The Violations Occurred.

ATS jurisdiction over human rights violators in the United States is also important because as a practical matter frequently there is no other forum in which these defendants can be held accountable for their crimes.

Human rights violators found in the United States often are not subject to personal jurisdiction in the courts of other countries. For example, in *Lizarbe v. Rivera Rondon*, the defendant – a former Peruvian army officer accused of extrajudicial killing, torture, and war crimes arising out of the massacre of a Peruvian village – was living in Maryland, beyond the criminal jurisdiction of Peru, which sought his prosecution. However, he remained within the jurisdiction of the U.S. courts, and the court denied his motion to dismiss an ATS suit against him for lack of personal jurisdiction. 642 F. Supp. 2d 473, 479-80 (D. Md. 2009).

In addition, the justice systems of countries where the violations occurred may be nonexistent or incapable of providing relief. For instance, a report by Amnesty International describes the criminal justice system in Nigeria, where the crimes against the parties in the instant litigation took place, as

"utterly failing."[6] A global governance study labels Nigeria the fourteenth most "failed state" in the world, citing repeated political violence, exacerbated ethnic conflict, and "pervasive[]" corruption.[7]

Nigeria is far from alone in lacking a justice system that can afford victims of human rights abuses fair opportunities to vindicate their rights. Somalia, for instance, has "no functioning nationwide legal system."[8] Likewise, El Salvador – years after the end of its bloody civil war – continues to struggle to establish a justice system. According to a State Department report, in El Salvador, "[t]he principal human rights problems were widespread corruption, particularly in the judicial system; weaknesses in the judiciary and the security forces that led to a high level of impunity."[9]

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[6] Press Release, Amnesty Int'l, Nigeria: Criminal Justice System Utterly Failing Nigerian People; Majority of Inmates Not Convicted of Any Crime (Feb. 26, 2008), *available at* http://www.amnesty.org/en/for-media/press-releases/nigeria-criminal-justice-system-utterly-failing-nigerian-people-majority.

[7] *See* Fund for Peace, Country Profile: Nigeria 3 (2011), *available at* http://www.fundforpeace.org/global/states/ccppr11ng-countryprofile-nigeria-11e.pdf; *The Failed States Index 2011*, Foreign Policy (June 17, 2011), *available at* http://www.foreignpolicy.com/articles/2011/06/17/2011_failed_states_index_interactive_map_and_rankings; *see also Background Note: Nigeria*, U.S. Dep't of State (Apr. 19, 2012), *available at* http://www.state.gov/r/pa/ei/bgn/2836.htm ("Nigeria is challenged by poor governance [and] entrenched corruption.").

[8] *Background Note: Somalia*, U.S. Dep't of State (Apr. 20, 2012), *available at* http://www.state.gov/r/pa/ei/bgn/2863.htm.

[9] U.S. Dep't of State 2011 Human Rights Report, El Salvador (May 24, 2012), available at http://www.state.gov/j/drl/rls/hrrpt/2000/wha/768.htm.

Even if a country's judicial system is functioning, the risk of reprisals may prevent plaintiffs from bringing suits in foreign jurisdictions. For instance, the Eleventh Circuit in *Arce* found that the military regime would have suppressed evidence and thwarted any attempt to bring suit, and "[t]he plaintiffs legitimately feared that their family members and friends remaining in El Salvador would be subject to harsh reprisals and the same brutalities that the plaintiffs suffered." *Arce*, 434 F.3d at 1263. *See also Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1147 (E.D. Cal. 2004) (same).

The United States has a special interest in protecting its own residents – who are plaintiffs in many ATS cases – from retaliation. Thus in ATS lawsuits like many of CJA's that involve U.S. resident plaintiffs, it would be particularly unfair to force those plaintiffs to return to the country where they were victimized in order to seek redress from defendants who are in the United States.[10]

3. The ATS Provides The Only Meaningful Remedy For Many Human Rights Abuses.

The ATS has long served as the principal – and, indeed, is often the only realistic – means of holding individuals accountable for violations of human rights in other countries. Neither the TVPA nor state tort law provides an adequate substitute.

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[10] As a result of the fear of retaliation, plaintiffs in ATS suits who are not in the United States often choose to initially proceed anonymously, as John or Jane Does.

1. Because the TVPA was explicitly designed as a supplement to the broader extraterritorial reach of the ATS, it does not in itself adequately deny safe haven to human rights abusers.

First, the TVPA extends only to extrajudicial killing and torture. *See* 28 U.S.C. § 1350 note. By contrast, the ATS encompasses a broader spectrum of heinous conduct, including genocide, war crimes, piracy, and crimes against humanity, among others. The impact of this distinction is illustrated by contemporary events in central Africa. Led by Joseph Kony, a rebel group called the Lord's Resistance Army (LRA) has terrorized the region for decades, engaging in the systematic cruel and inhuman treatment of innocent civilians. If Kony or any of his henchmen were to move to the United States, they could face liability under the ATS for the full range of their crimes, but not under the TVPA, because many of their actions – including forcing up to two million people into refugee camps and using children as soldiers[11] – do not necessarily fall within the scope of the TVPA. For similar reasons, in many of CJA's cases, described in Part I *supra*, a number of the claims involving serious human rights abuses, such as prolonged arbitrary detention and war crimes, are cognizable under the ATS, but not the TVPA.

Second, the TVPA "does not attempt to deal with torture or killing by purely private groups." H.R.

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[11] *See* Fact Sheet, The Lord's Resistance Army, Office of the Spokesperson, U.S. Dep't of State (Mar. 23, 2012), *available at* http://www.state.gov/r/pa/prs/ps/2012/03/186734.htm.

Rep. No. 102-367, at 5. Instead, the statute reaches only torture or extrajudicial killings committed "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note. By contrast, the ATS permits liability for individuals acting outside state authority. *See Kadic v. Karadzic*, 70 F.3d 232, 242-44 (2d Cir. 1995) (holding that plaintiffs in an ATS suit did not have to satisfy a state action requirement with regard to claims of genocide and war crimes). Once again, the impact of this distinction is illustrated by contemporary events in central Africa. Kony's rebel group the LRA has terrorized the region for decades, continuing to "kill, torture, maim, rape, and abduct large numbers of civilians, virtually enslaving numerous children"[12] seemingly without acting under the authority of any official government.[13] The ATS undoubtedly covers Kony's and the LRA's conduct. The TVPA would not unless Kony's victims could show that Kony or the LRA was acting under the color of law of a foreign nation.

2. State tort law is an "inadequate placeholder" for the values that proscribe the grave wrongs meant to be addressed under the ATS because these violations are not "garden-variety municipal tort[s]." *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D. Mass. 1995). All that tort law can provide is monetary damages – "a dollar value on the lives lost . . . and the

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[12] *The Lord's Resistance Army (LRA)*, GlobalSecurity.org, http://www.globalsecurity.org/military/world/ para/lra.htm (last visited June 6, 2012).

[13] *See id.*

suffering inflicted," *Mushikiwabo v. Barayagwiza*, No. 94 CIV. 3627 (JSM), 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996). By contrast, the verdict in an ATS case also expresses the judgment that the defendant's conduct has violated the law of nations. In CJA's experience and from the experience of *amici*, this judgment is often the most important aspect of the case.

C. The ATS Was Intended To Ensure That Federal Courts Are The Principal U.S. Forum For Adjudicating International Law Violations.

The very reason for the ATS's existence is to extend *federal* jurisdiction to suits filed by aliens. At the time the ATS was enacted, tort suits with weighty implications for American diplomacy were being litigated in state courts, and the federal government was powerless to provide any remedy. *See Sosa v. Alvarez-Machain*, 542 U.S. at 715-18. Because such tort suits became a source of considerable friction between the United States and other nations, the First Congress responded by enacting the ATS, which this Court has cited as "reflecting a concern for uniformity in this country's dealings with foreign nations." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964). The ATS and other statutes "indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions," *id.*, and the legal framework used in federal courts is well adapted to the unique nature of human rights claims. *See also* Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.

1980) (No. 79-6090), *reprinted in* 19 ILM 585, 588 (1984) (relying on *Sabbatino*).

Sosa made clear that the ATS charges the district courts with applying the law of nations, and empowers them to recognize causes of action that are "accepted by the civilized world and defined with [sufficient] specificity." *Sosa*, 542 U.S. at 725. The claims that ATS plaintiffs bring – for crimes against humanity, war crimes, genocide, and other depredations – meet the *Sosa* test and draw on a body of international law specifically meant to deal with such crimes. The federal courts have also had ample opportunity to work out the procedural doctrines applicable to ATS cases – including, for instance, when equitable tolling of the statute of limitations is appropriate. *See* S. Rep. No. 102-249, at 10-11 (list of "tolling principles which may be applicable" in TVPA cases); *see also, e.g.*, *Carranza*, 559 F.3d at 492 (noting that justifications for equitable tolling "apply equally" to ATS claims).

III. A Categorical Bar On ATS Suits Based On Extraterritorial Conduct Is Unnecessary And Would Be Counterproductive.

Adopting a categorical rule against ATS litigation for human rights violations that occur overseas is unnecessary. There are a variety of existing doctrines that fully protect against lawsuits proceeding in U.S. courts that should not be brought here.

A. The Due Process Clauses Protect Against The Assertion Of Personal Jurisdiction In Cases Where The Defendant Has No Tie To The United States.

1. As this Court has stated, personal jurisdiction is "an essential element" of any lawsuit, "without which the court is 'powerless to proceed to an adjudication.'" *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937)). Courts have the power to dismiss cases – including ATS cases – for lack of personal jurisdiction without first addressing the scope of the ATS. *See id.* at 588. That power provides adequate protection to defendants who lack substantial contacts with the United States.

Thus, a categorical rule barring ATS suits alleging extraterritorial human rights violations is unnecessary. Such cases will be dismissed under existing doctrine if the defendant lacks the relevant contact with the United States required for the exercise of personal jurisdiction. "[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts," except with regard to conduct occurring within that jurisdiction. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787-88 (2011). Accordingly, foreign defendants alleged to have committed human rights violations abroad will only be subject to jurisdiction if their contacts with a U.S. forum are so "continuous and systematic" as to make the exercise of jurisdiction over the defendant "fair and reasonable."

Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952).[14]

Under standard personal jurisdiction doctrines, a foreign defendant who lacks significant contacts with the United States is not subject to suit in our courts on *any* claim arising extraterritorially – whether under the ATS, other federal statutes, state law, or foreign law. The only defendants categorically subject to liability in the United States for extraterritorial acts under the ATS are those who, through their decisions to reside or incorporate or otherwise to have pervasive contact with the United States, have evinced an "intention to benefit from and thus an intention to submit to the laws of [a] forum State," sufficient to permit the assertion of general personal jurisdiction. *Nicastro*, 131 S. Ct. at 2787.[15]

2. Even when the Due Process Clause permits an ATS case to go forward because there is personal

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[14] There may be some ATS suits against foreign defendants where plaintiffs have plausibly alleged facts sufficient to confer specific personal jurisdiction – if, for example, decisions were made by company officials while in the United States to perpetrate human rights violations abroad.

[15] A natural person could be subject to jurisdiction for a cause of action occurring outside the United States if served with process within the forum jurisdiction, *see Burnham v. Superior Court of Cal*, 495 U.S. 604 (1990), but this possibility hardly diminishes the usefulness of personal jurisdiction as a check on litigation that should not take place in the United States. "Tag" jurisdiction normally attaches only to a person who voluntarily chose to come to the United States – a choice that would leave the defendant little room to complain that exercising jurisdiction over him is unfair.

jurisdiction over the defendant, the federal courts retain the ability to decide that an individual case is ill suited for adjudication here. The doctrine of *forum non conveniens* permits a court to dismiss an ATS complaint when the defendant can show that there is a truly adequate alternative forum for the litigation and that the balance of private and public interest factors weighs in favor of dismissal. *See, e.g.*, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (dismissed in favor of Ecuador); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009) (Guatemala). This safety valve ensures that, even where there is general or specific jurisdiction over defendants, courts can decline to hear those cases that are impractical and inappropriate to try in the United States,[16] while continuing to hear cases where the United States *is* the most appropriate forum for adjudication.

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[16] This Court has also suggested that courts may consider whether a plaintiff has exhausted the remedies available in the jurisdiction where the injury occurred, though the statute lacks an explicit exhaustion requirement. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). A prudential exhaustion requirement gives courts another means of controlling their exercise of jurisdiction while continuing to hear cases where adjudication in the alternative forum is simply impossible.

B. The Federal Government Has Adequate Means For Protecting U.S. Interests Potentially Implicated By Particular ATS Cases.

The Government undoubtedly has an interest in ensuring that any human rights litigation brought in U.S. courts has a sufficient connection to the United States and does not conflict with its foreign policy goals.

This interest is best served by keeping such suits where they belong – in federal courts, which have developed case law on the causes of action that violate the law of nations and the procedural rules appropriate for human rights cases. The Government is also far more familiar with the federal forum than with state courts, and it is able to participate in human rights litigation, to assert its views about the propriety of the litigation, at the federal level on a case-by-case basis.

When the Government participates in ATS litigation, it exerts considerable influence over whether federal courts will hear particular cases. It can use a Statement of Interest in the district court or an *amicus curiae* brief in the Court of Appeals to inform the court whether its exercise of jurisdiction is in the interest of the United States. These filings carry great weight in judicial determinations of justiciability. Indeed, this Court recently affirmed "the State Department's role in determinations regarding individual official immunity." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010).

Notably, the Government sometimes uses Statements of Interest to express *support* for an ATS

suit. After this Court denied the defendant immunity under the Foreign Sovereign Immunities Act ("FSIA") in *Samantar*, the case was remanded to the district court, where the Government filed a Statement of Interest to express the view that the defendant should be denied any official immunity. Statement of Interest of the United States, ¶ 9, *Yousuf v. Samantar*, No. 1:04 CV 1360 (E.D. Va. Feb. 14, 2011). In making its recommendation, the State Department declared "that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts." *Id.* The Government has expressed similar views in other cases. *See, e.g.*, Statement of Interest of the United States, ¶ 9, *Ahmed v. Magan*, No. 2:10-CV-342 (S.D. Ohio Mar. 15, 2011). A categorical bar on ATS suits concerning extraterritorial events would thus undermine the stated foreign policy interest of the United States in "promoting the protection of human rights" and "condemn[ing] human rights abuses." Brief for the United States of America as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), (No. 08-1555), 2010 WL 342031, at *1.

To be sure, the Government also uses Statements of Interest to raise concerns about ATS suits that may create diplomatic tensions for the United States. And this Court has said that when the United States expresses its agreement with a foreign country that a suit would interfere with that nation's policies, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa*, 542 U.S. at 733 n.21. Lower courts have followed this direction.

They give appropriate consideration to the State Department's Statements of Interest – often formally requesting that the State Department express its view in a case where it has yet to do so – and have shown their willingness to dismiss ATS cases when they raise legitimate political questions. This is particularly true with regard to questions of official immunity. The Government's position often influences judicial determinations as to whether ATS defendants enjoy immunity from suit under traditional federal common-law doctrines. For example, the United States filed a Statement of Interest urging dismissal on common-law immunity grounds in *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), a suit brought against the former head of the Israeli Security Agency. The Second Circuit, largely on the basis of the Statement of Interest, agreed. *Id.* at 14.

Even in the absence of a Statement of Interest, courts can still take into account the stated policy interests of the Government and dismiss suits on that basis. *See, e.g., Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 983-84 (9th Cir. 2007) (dismissing based on political question doctrine claim against manufacturer of bulldozers used to demolish homes in Palestinian territories because, although no Statement Of Interest was filed, evidence showed that "[t]he executive branch has made a policy determination that Israel should purchase Caterpillar bulldozers"). The Government's ability to lodge Statements of Interest or otherwise express its position in ATS cases obviates the need for a categorical bar.

C. Channeling Human Rights Cases Into State Courts Would Frustrate Federal Policy.

If ATS suits are unavailable, plaintiffs with human rights claims against U.S.-based defendants will instead likely bring suit in state courts, where common law tort remedies might still be available to them. But as *amici* have already explained, state law is ill suited for dealing with the grave wrongs encompassed by the ATS. *See supra* at 23-24.

Faced with these cases, state courts will produce decisions that could turn human rights litigation, currently decided according to a uniform body of international and federal common law, into an unruly patchwork of unpredictable rules. The source of substantive law in such tort suits would not necessarily be the law of nations, as in ATS suits, but rather whatever is dictated by state choice-of-law rules. In some cases, this might be the law of the forum state itself; in many others, the state court would use the law of the jurisdiction where the human rights violation took place. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 Am. J. Comp. L. 303, 331 (2011) (list of state methodologies). Indeed, it is even possible that some states would choose to use international law as the rule of decision.

Statutes of limitations also vary from one jurisdiction to another. *Compare* Minn. Stat. Ann. § 541.05 (six-year statute of limitations for assault, battery, false imprisonment, and other personal injuries), *with* Tenn. Code Ann. § 28-3-104(a)(1) (one-year statute of limitations for same). There would be

little predictability – for plaintiffs, defendants, or the Government – in an environment where the law applicable to a human rights suit could vary so dramatically from state to state.

The state courts would also have to redevelop from scratch the legal doctrines that federal courts currently apply in ATS cases – a task they are sure to perform inconsistently. State courts would need to decide independently when to treat their statutes of limitations as having been tolled. The same would be true for many other doctrinal questions, including command responsibility, a subject treated extensively in international law. *See Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1704 (2012), (affirming command responsibility as a theory of liability in TVPA cases); *Ford v. Garcia*, 289 F. 3d 1283 (11th Cir. 2002) (setting forth the elements of command responsibility), *cert denied*, 537 U.S. 1147 (2003). States' decisions on these questions could differ substantially, and the only appellate forum with the power to correct a state's error and restore uniformity on some point of law would be this Court. Indeed, to the extent that a state court's decision on these matters turns on questions of state law, this Court might lack power to review its judgment at all. The troubling prospect of such legal disorder makes plain that cases against perpetrators of violations of the law of nations are best adjudicated in the forum the First Congress chose for them – the federal courts.

A categorical rule against adjudicating ATS suits for violations occurring overseas would also require the Federal Government to monitor the entire state-level judicial system and be prepared to intervene in litigation there – a vastly more difficult enterprise. It

would be harder for the State Department to monitor activity in the states given their decentralized judicial systems, which have far more trial courts of general jurisdiction than there are federal district courts.[17] If the Federal Government decided to intervene, it would be forced to do so in an unfamiliar and inconvenient forum.

The current system of human rights litigation under the ATS thus permits federal courts to hear human rights cases that are within their jurisdiction, while allowing the Executive Branch to intervene on a case-by-case basis to discourage any suits that create genuine problems for American foreign policy. This system is sufficiently flexible to accommodate any prudential or practical concerns associated with ATS litigation. Replacing it with a categorical bar to *any* litigation arising from extraterritorial events – even suits against defendants in the United States for conduct that unquestionably violates the law of nations – is unnecessary and counter to the longstanding policy of this country to deny safe haven to perpetrators of egregious human rights abuses.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[17] As former California Supreme Court Chief Justice Ronald George has noted, California's court system is "about double the size of the federal Article III judiciary nationally." Ronald M. George, *Access to Justice in Times of Fiscal Crisis*, 40 Golden Gate U. L. Rev. 1, 2 (2009).

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